

**MINUTES**

**MONTANA SENATE  
56th LEGISLATURE - REGULAR SESSION  
COMMITTEE ON STATE ADMINISTRATION**

**Call to Order:** By **CHAIRMAN MACK COLE**, on February 11, 1999 at  
10:00 A.M., in Room 331 Capitol.

**ROLL CALL**

**Members Present:**

Sen. Mack Cole, Chairman (R)  
Sen. Don Hargrove, Vice Chairman (R)  
Sen. Jon Tester (D)  
Sen. Jack Wells (R)  
Sen. Bill Wilson (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Keri Burkhardt, Committee Secretary  
David Niss, Legislative Branch

**Please Note:** These are summary minutes. Testimony and  
discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: HB 89, 2/8/1999; SB 382, SB  
400, 2/6/1999  
Executive Action: None.

**HEARING ON HB 89**

**Sponsor:** REP. MARY ANNE GUGGENHEIM, HD 55, HELENA

**Proponents:** Jim Green, Administrator of Disaster and Emergency  
Services, Department of Military Affairs.

*{Tape : 1; Side : A; Approx. Time Counter : 8 - 15}*

**Opening Statement by Sponsor:**

**REP. MARY ANNE GUGGENHEIM, HD 55, Helena,** explained she has brought this legislation forward on behalf of the Department of Military Affairs. It changes how the State Emergency Response Commission is organized. The State Emergency Response Commission is one of the parts of the Department of Military Affairs and falls under the area of Division of Disaster and Emergency Services. This commission organizes the way a variety of people respond to emergencies having to do with hazardous spills. The changes proposed in the bill have to do with the number and composition of the members of this commission. These reflect the reorganization that has been done in State Government in the last couple of years. The changes designate the length of terms at four years, which was previously not designated.

**Proponents' Testimony:**

**Jim Green, Administrator of Disaster and Emergency Services, Department of Military Affairs,** read **EXHIBIT (sts34a01)**. He said this is essentially a housekeeping bill to better match how the commission is operated and managed.

**Questions from Committee Members and Responses:**

**SEN. HARGROVE** asked why they have two presiding officers. **Mr. Green** explained the Department of Environmental Quality has some of the regulatory hazardous material issues in the state, where the Department of Military of Affairs has some of the responsibilities to assist local government. To make sure that communication is not lost between the two agencies, they have two presiding officers. **SEN. HARGROVE** asked if there would be a problem with control and being in charge. **Mr. Green** stated he and the other presiding officer, **Tom Ellerhoff, Department of Environmental Quality,** have worked together for five years and this is documenting how well it has been working.

**SEN. COLE** asked why they went from 20 members to 19 members. **Mr. Green** said one of the attorneys from the tort liabilities, for the Department of Administration, was also a member of this commission. He was not actively participating and did not really feel the need to participate. He said he would be available for any liability issues that the commission may come up with, therefore he was removed.

**Closing by Sponsor:**

**REP. GUGGENHEIM** urged the committee to support this bill.

**{Tape : 1; Side : A; Approx. Time Counter : 15 - 28}**

HEARING ON SB 382

Sponsor: SEN. SUE BARTLETT, SD 27, HELENA

Proponents: Ernie Nunn, Retired Federal Employee  
Kevin Keenan, Montana Truth in Government Act,  
PEERS  
Luella Shultz  
Mike Fellows, Montana Libertarian Party, Trustee  
of the Hotel Employee's Restaurant Union  
Tom Schneider, Montana Public Employees  
Association, Montana Federation of State Employees

Opponents: John McEwen, Administrator of the State Personnel  
Division, Department of Administration  
Leroy Schramm, Legal Council, University System

Opening Statement by Sponsor:

SEN. SUE BARTLETT, SD 27, Helena, explained this bill is a refinement of a bill introduced last session. It provides a remedy for employees who report mismanagement, gross waste, abuse of authority, or violations of law, rule, or policy in any state agency. **Senate Bill 382** prohibits supervisors in State Government from taking adverse personnel actions such as involuntary demotion, reduction in pay or duties, and termination when the reason for those actions is because the employee has reported waste, fraud, or abuse in state government. If the issue of such a disclosure is raised in such a personnel action taken against the employee, the employee must demonstrate, by a preponderance of evidence, that the disclosure is the reason for the personnel action.

That also requires the employee to demonstrate by the majority of evidence that waste, fraud, abuse, or illegal actions did take place. The claim cannot be made without demonstrating the likelihood the claim is true. When the employee meets this burden of proof, the burden of proof shifts to the supervisor to provide clear and convincing evidence that the employee is wrong and the personnel action is based on the employee's job performance, not the disclosure of waste, fraud, abuse, or illegal action. The change in the level of evidence bothers the opponents to this bill because they see it as unequal and unfair. Preponderance of the evidence is evidence which, when fairly considered, produces the stronger impression, has the greater weight and is more convincing as to its truth when weighed against the evidence in opposition. Clear and convincing

evidence is a high standard requiring strong evidence that produces in the mind of the court a firm belief or conviction, but is less than conclusive. The relative burdens of proof in this bill is taken directly from the Federal Whistle Blower Protection Act, so there is direct precedence. She asked the committee to consider the power differential between an employee and an agency. The key issue in these cases is determining the agency's motive for the personnel action. The agency is in a better position to demonstrate what the agency's motive was because they have the resources, files, and information. Therefore, she said she is comfortable with the two levels of burden of proof. This bill also authorizes an employee who has been subjected to adverse personnel action for speaking the truth to file a civil action in district court. If the employee proves the case, the court may award back pay with interest, compensatory damages, restoration of job and benefits, and a clean personnel file. She added the court may award any or all of those. Section 7 lets the party who wins in a court case seek costs and reasonable attorney fees.

It is imperative to provide an avenue, outside the agency, where these cases can be heard in a neutral forum. In most cases, when retaliation is taking place, an employee simply cannot receive fair treatment in the agency. She explained the state's grievance policy. First, an employee is encouraged to resolve the grievance informally with the immediate supervisor, who may well be the person who took the adverse personnel action to begin with. The employee may bypass this step and begin the formal process by filing a written grievance with the immediate supervisor or the next level above the immediate supervisor. The process usually ends with a final review by the department head. No one outside the department is ever involved in resolving that type of grievance. The exceptions are cases that involve discharge, disciplinary demotion, or suspension without pay for more than 10 working days. In these cases the grievance goes to a hearing. The management representative chooses whether to request a hearings officer from the Attorney General's office, or a list of 3-5 hearings examiners from the Board of Personnel Appeals. A hearing examiner is selected through a process that involves the grievant as well as the agency. The case is heard and the hearing examiner makes non-binding recommendations to the Department Head. The Department Head makes the final administrative decision. The established grievance process, for state employees that are not a part of a collective bargaining unit, never really gets outside the agency. That is why a separate neutral forum is essential.

Finally, this bill specifies the supervisor that violates this act is subject to disciplinary action, up to and including

dismissal from his position. The employee who told the truth is to be notified whether disciplinary action is to be taken, and if so, what the action will be and the time by which it will be taken. The opponents have raised a question of Constitutional right to privacy for the supervisor who will be disciplined. She asked the committee to address that point through amendments. She handed out a summary of laws in other states that address similar types of legislation and issues **EXHIBIT(sts34a02)**. At least 33 other states, as well as the Federal Government, have laws similar to this bill. State Government in those 33 other states has not ground to a halt because of a bill like this one and it would not halt in Montana. She handed out a letter from **SEN. DELWYN GAGE EXHIBIT(sts34a03)**.

*{Tape : 1; Side : A; Approx. Time Counter : 28 - 43}*

**Proponents' Testimony:**

**Ernie Nunn, Retired Federal Employee**, said he has used the system before the committee and he is in support of this bill. The reason that a lot of fraud, waste, and abuse is not reported is because there is currently no protection for an employee to bring some issues forward. He said he was put in the position, after spending 30 years in United States Forest Service, of taking on the United States Department of Agriculture. If wasn't for a process he could take outside the agency, so he could get a fair and legitimate hearing, he would have never come forward. He said many employees in state agencies have a fear of retaliation. In order to correct the problems in state agencies, actions have to be taken to help the employees expose some of that.

**Kevin Keenan, Montana Truth in Government Act, PEERS**, read **EXHIBIT(sts34a04)**.

**Luella Schultz**, she handed **EXHIBIT(sts34a05)**. This bill offers protection to do what is right. She works for a department that is not represented by a union. First, she was informed that she was not allowed to attend hearings if she is the program manager for that particular issue. Then she was informed that she would attend and only provide a short response, and only the information that responded to the question asked. She is lead to believe she has to suppress information and knowledge she has because of the Department's position of neutrality. If the committee wants to know what is right and factual, they should support this bill. This bill offers protection to employees who want to tell the truth.

*{Tape : 1; Side : A; Approx. Time Counter : 43 - 48}*

**Mike Fellows, Montana Libertarian Party, Trustee of Hotel Employees Restaurant Union** explained one of his members disclosed the state was not paying their share of payroll taxes in regards to contracting an employee. His life has been destroyed. He was a contractor and not a direct state employee. This type of legislation would help those people. The government should be held to the same standards as private industry.

**Tom Schneider, Montana Public Employees Association, Montana Federation of State Employees**, said they support this bill and its concept. They support Section 2 because it deals with areas they feel are good government. It further deals with areas that currently cannot protect people from retribution. One of the major complaints they get is harassment, which is one of the few things they cannot protect an employee against. There is no way, under a union contract, to protect an employee against harassment unless there is a direct action taken that falls within the purview of the contract. There are a couple of problems with the bill. There has to be a point of complaint. The first time the employer finds out they have a problem is when they get a serving from the court.

If there is a personnel action, and the employee is covered by a collective bargaining agreement and chooses the remedy of the collective bargaining agreement, he should not be able to choose the court action. The two remedies are very different he perceives a dual action in every instance. Under the contracts, they must report a violation or grievance within 15 days to their immediate supervisor. There is a specified process of steps that ultimately leads to arbitration. Arbitration is a decision by a neutral body as to which side is right and what the remedy would be. The remedies under arbitration are much less than the remedies provided in this bill. Compensatory damages are not given through the arbitration process. There are a lot of employees that are not covered by contract. Therefore, there needs to be another remedy for them, but if there is a dual remedy, there should be an election of remedy provided for.

*{Tape : 1; Side : B; Approx. Time Counter : 48 - 66}*

**Opponents' Testimony:**

**John McEwen, Administrator of the State Personnel Division, Department of Administration**, read and discussed **EXHIBIT (sts34a06)**.

**Leroy Schramm, Legal Council, University System**, stated Section 2 enunciates a principal no one can disagree with, but it is not

accomplished by this bill. He explained it is hard to get rid of bad employees. Usually supervisors are too cautious. There are two sides to this. The things heard today are violations of law already. This adds an additional protection and changes the burden of proof. It makes it even harder for the state to defend legitimate actions of supervisors because it expands the reasons why employees can complain. The Wrongful Discharge Act is a whistle blower statute and gives a person a cause of action if an employee is fired for reporting a violation of law or policy. The protections in place are adequate to protect public employees. They do not want to make the public employee immune from action, discipline, and instruction for good cause. If an employee is trying to get a remedy from another procedure, they should not be able to use this one too.

***{Tape : 1; Side : B; Approx. Time Counter : 66 - 85}***

**Questions from Committee Members and Responses:**

**SEN. WILSON** asked if it's possible to segregate this remedy from other actions. **SEN. BARTLETT** said the election of remedies needs to be addressed for someone who is in a collective bargaining unit. Unions are subject to suit from members for failure to represent; therefore, some provisions need to be put in place. Although the opponents believe people have remedies available to them, they do not. The Wrongful Discharge Act applies if the employee is fired or left their job. Many whistle blowers are good long-term employees who have an excellent personnel history. For this reason, it is hard to fire them even when they are speaking the truth about something a particular supervisor does not want told.

Instead of firing them, they take employees away, give undesirable transfers, and take away responsibilities for your area. The Human Rights Act is only available if you have suffered discrimination on the basis of race, color, creed, religion, national origin, gender, and those types of things. The Constitutional right to free speech is not readily available for employees speaking about employment situations. She would have to contemplate whether she would allow the employee not in a collective bargaining unit to choose one remedy.

**SEN. WILSON** asked, assuming he was an employee who was being harassed for whistle blowing, what his options would be. **Mr. Schramm** said under most of their contracts, the employee could grieve an adverse personnel action if the action does not have just cause. If it was a result of speaking out, the person probably has a cause of action under US Code 42, Section 1983.

The harassment may be hard to remedy in some cases. Making the remedy exclusive would mean the person can only use one remedy.

**SEN. WILSON** asked **Mr. Schneider** if lost wages were included in the compensatory damages that cannot be recovered in arbitration. **Mr. Schneider** said that those wages could be recovered and are called a back pay reward. Compensatory damages are compensating the person for suffering. **SEN. WILSON** asked where this bill stands in regards to compensatory damages. **Mr. Schneider** said the court could order any type of a damage settlement.

**SEN. WELLS** asked what the acronym PEERS stands for. **Mr. Keenan** stated PEERS stands for Public Employees for Environmental Responsibilities. **SEN. WELLS** asked what department **Mr. Keenan** worked in for the period of 25 years he said he worked in State Government. **Mr. Keenan** said he worked for Fish, Wildlife and Parks for an accumulative time of about 12 months. He also worked for the Department of Health and Environmental Sciences as a chemist. Later he worked in Enforcement and finally, in the reorganized Department of Environmental Quality for the completion of his career. **SEN. WELLS** asked if he felt there was an legitimate route to voice his opinion, covered under statute. He asked if there was not, what was the organized grievance method in his situation. **Mr. Keenan** explained he consulted an attorney when he was asked to be dishonest on the job. The attorney told him to write a memo, explaining why he thinks it is wrong, and provide it so he would not be on the receiving end of a disciplinary action he could not control.

*{Tape : 2; Side : A; Approx. Time Counter : 85 - 104}*

**SEN. WELLS** said the opponents stated this bill sets up a system that makes a bad employee even worse. He asked if there was a way to protect against the misuse of this legislation if it were passed. **SEN. BARTLETT** responded some bad employees will try to use this, but the courts will screen those cases out very fast. Managers who are doing their jobs and have been trained on how to deal with personnel actions will have the protection. **SEN. WELLS** said that this bill addresses the protection of the employee and discusses the kinds of actions needed to protect that employee, but it doesn't talk about the act of whistle blowing. He asked if there are other statutes that should be referred to show the steps a person should take to report the fraud, waste, and abuse.

**SEN. BARTLETT** said it is not in this bill. She is willing to work to find a way to make a reporting system viable. She has explored the question with the Legislative Auditor's Office and their concern was that these kinds of complaints would skew their



work load. She is not willing to make that a requirement that would preclude someone from pursuing a hearing and personnel action or a court case under the Truth in Government Act. There are instances where those kinds of procedures, in the hands of a policy who did not want to deal with these issues, were used to bottle up any constructive action on complaints.

**SEN. HARGROVE** asked **Mr. Schneider** to expand on his problem and possible solutions with the point of complaint. **Mr. Schneider** said he has discussed the Legislative Auditor's Office because the Auditor's Office has a toll free line the public can make similar kinds of complaints to. He said he had not gone beyond the Legislative Auditor's Office. Any good management should have the right to rectify the problem before it becomes a public issue.

**Closing by Sponsor:**

**SEN. BARTLETT** said this needs to be kept in perspective. She represents a lot of state employees. The vast majority of state employees are good employees. This bill focuses on a negative aspect, but it is not the big picture. There are instances where actions are taken against employees to stifle the truth, and those employees need protection that is not given under current law. She handed out an article **EXHIBIT(sts34a07)**.

**HEARING ON SB 400**

**Sponsor:** **SEN. RIC HOLDEN, SD 1, GLENDIVE**

**Proponents:** None.

**Opponents:** **Alan Theson, School Bus Driver, Lanbert**

**Opening Statement by Sponsor:**

**SEN. RIC HOLDEN, SD 1, Glendive,** explained **SB 400** leaves Montana on Daylight Savings time all year round. Twice a year we change our clocks, in spring and fall. This upsets the lives of working people, kids going to school, and the elderly people. It is not something we need to do. It makes more sense to stay on one time through the entire year. This will give us one more hour of daylight at the end of the day. There are more street lights, better lighted vehicles and buildings, and more people who work inside in the morning than there was in the past when they began changing the clocks. Our citizenry goes home to darkness. This bill provides more daylight hours for recreation and time with

our families. It also provides another hour of daylight for teachers in the evening.

**{Tape : 2; Side : A; Approx. Time Counter : 104 - 123}**

**Opponents' Testimony:**

**Alan Theson, School Bus Driver, Lanbert,** stated he doesn't like having to change the clocks. Our school days are centered in the daylight hours. In the past they tried to have daylight savings time all year round, but early morning drivers were running over school children. They decided the casualties were too high to continue. On the shortest days of the year, he picks up the first school kids at dawn and drops the last one off at dusk. He said the convex mirrors on the front of his school bus, mandated by law, have saved thousands of lives. The convex mirrors do not work when it's dark. If the time is changed, his entire morning bus route will be in the dark. The safety of the school kids should not be jeopardized for another hour of daylight.

**Questions from Committee Members and Responses:**

**SEN. WELLS** asked **SEN. HOLDEN** to respond to the opponent's contention. **SEN. HOLDEN** said he is an automobile accident investigator, and the fact is there are more automobile accidents between automobiles and children when it's daylight and school is let out. Therefore, the end of the school day is the time of day we need more daylight. People move more slowly and orderly to work and school in the morning.

**SEN. TESTER** asked if **SEN. HOLDEN** had any statistics that would show a rise or decline in fatalities or accidents with busses picking up kids in the dark. **SEN. HOLDEN** said the year 1999 is different than the 1970's. The lighting is better now. There are no statistics he is aware of figure those accidents. **SEN. TESTER** stated he doesn't believe the lighting has changed that much and he is more concerned with the rural areas. **SEN. HOLDEN** said school bus drivers know how many children get on their bus at each stop in rural areas. If all of the children are not on the bus, the driver is asks where the missing child is. He said those types of accidents could happen, but they also happen any time of the day. **SEN. TESTER** said the advantage is to give people an extra hour of daylight in the afternoon, but he's curious why its not moved to give people two hours. **SEN. HOLDEN** said Montana will be out of sync with its neighboring states. If the bill passes as written, Montana will be in a much better position with North Dakota and Idaho for commerce. For half the

year Montana would be at the same time zone as North Dakota, and commerce across state lines would be a lot easier.

**SEN. WELLS** asked if it would be feasible to install a flood light on the bus to illuminate the areas around the bus in order to give the driver the opportunity to survey the area the mirror covers. **Mr. Theason** replied it is possible, but it would not be without problems. It is better than running over children. Maintaining and mounting the mirrors might cause problems. According to Montana law and policy, bus drivers are not supposed to wait for children if the children are not at the bus stop on time. When its below zero the kids standing down the road are waiting for the bus to be there on time. Children will be standing outside in below zero temperatures, in the dark and by the road. He pointed out other drivers on highways are driving 55 to 60 miles per hour.

**SEN. COLE** asked **SEN. HOLDEN** what part of Mountain Standard time goes into North Dakota. **SEN. HOLDEN** said there is a small southwest corner. **SEN. COLE** asked if this would create a problem in having Daylight Savings Time in North Dakota. **SEN. HOLDEN** explained this would compliment us and North Dakota for half a year.

**Closing by Sponsor:**

**SEN. HOLDEN** closed

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**ADJOURNMENT**

Adjournment: 12:03 A.M.

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SEN. MACK COLE, Chairman

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KERI BURKHARDT, Secretary

MC/KB

**EXHIBIT** (sts34aad)